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No. 83-122

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HYDROKINETICS, INC., *Petitioner*

vs.

ALASKA MECHANICAL, INC., *Respondent*

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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LIST OF PARTIES

Respondent, Alaska Mechanical, Inc., has been advised by Petitioner that Hydrokinetics, Inc. is a wholly-owned subsidiary of PVI Industries, Inc., and that affiliated corporations are Mid Texas Manufacturing Company, Inc. and Texian Enterprisess, Inc., both of which are also wholly-owned subsidiaries of PVI Industries, Inc.

Respondent, Alaska Mechanical, Inc., is a corporation organized under the laws of the State of Alaska, and has neither parents nor subsidiaries nor are other corporations affiliated with it.

QUESTION PRESENTED

Under the facts of this case, would the exercise of jurisdiction under state law over the person of the non-resident Respondent comport with basic due process requirements of the United States Constitution?

ANSWER OF FIFTH CIRCUIT TO QUESTION PRESENTED

The United States Court of Appeals for the Fifth Circuit applied its well-known two-pronged test, i.e., (1) did the non-resident Respondent have enough minimum contacts with the state resulting from an affirmative act or acts on its part so that (2) it would not be unfair or unreasonable to require the non-resident Respondent to defend the suit in the forum. After carefully examining all of the facts and circumstances of this case, the Fifth Circuit concluded in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir.1983) at page 3220, that:

> "We do not hold that the facts relied on by Hydrokinetics in support of its contention that the district court in Texas has jurisdiction over the person of the defendant are not relevant to the determination; we merely conclude that, considering the totality of the facts of this case, the necessary inference of purposeful availment is not supported."

SUMMARY STATEMENT OF THE CASE

The opinion of the Court of Appeals for the Fifth Circuit reported in 700 F.2d 1026, a copy of which is attached as Appendix "B" to the Petition for Writ of Certiorari, sets forth in sufficient detail the facts surround-

ing the relationship of the Petitioner and the Respondent, and no further detailed recitation of such facts is required for an understanding of this case. Respondent would respectfully summarize the detailed facts as follows:

1) Respondent is an Alaskan corporation with principal offices in the City of Anchorage, Alaska, and works exclusively on projects within the State of Alaska. Respondent is not engaged in multi-state or interstate activities.

2) Respondent is not licensed to do business in the State of Texas; has never maintained offices, agents or employees in the State of Texas; and has never solicited to perform construction work within the State of Texas.

3) On the particular project for the U.S. Navy, Respondent had already been awarded the contract, having submitted a bid in reliance upon a bid from another heat exchange supplier (similar to Petitioner).

4) After securing the U.S. Navy contract, Respondent, in a strictly fortuitous manner, received a solicitation from another Alaskan corporation, representing Petitioner, seeking to supply the heat exchange equipment which Respondent was already prepared to purchase from another supplier. At no time did Respondent actively seek to do business with the Texas Petitioner. Respondent was only a mere passive customer of Petitioner.

5) After due negotiations, a written Purchase Order was prepared, executed first by Petitioner in the State of

Texas, and forwarded to Alaska where it was finally accepted by Respondent in the State of Alaska. The contract was thus completed in the State of Alaska.

6) The final written Purchase Order provided that it would be construed and interpreted under and in accordance with the applicable laws and decisions of the State of Alaska. The same final Purchase Order provided for a guarantee of payment of the obligations of Respondent by a bank in Anchorage, Alaska.

7) The equipment manufactured by Petitioner is now physically on site at the U.S. Navy facility at Adak, Alaska.

8) This equipment has been rejected by the U.S. Navy.

9) The equipment manufactured by Petitioner, the ultimate owner of the equipment, the job site, the prime contractor, the manufacturer's representative who solicited the contract on behalf of Petitioner, the Respondent, and many agents and employees of the foregoing, are all physically located in the State of Alaska. Alaska was and is the hub of the activity surrounding the relationship of the parties.

Significant factors, discussed by the Fifth Circuit in its opinion, which were controlling in other cases, but *absent* in the present case, were those of:

1) Lack of active solicitation of business by the out-of-state Respondent with the expectation of extracting profits from the resident Petitioner.

2) Lack of purposeful activity on the part of the out-of-state Respondent to avail itself of the privilege of con-

ducting activities within the State of Texas so as to invoke the benefits and protection of its laws.

3) Since only one contract and one transaction was involved, there was a lack of continuous or repeated transactions within the State of Texas.

4) There was a complete lack of any indication that Respondent was engaged in nationwide commerce of such a magnitude that Respondent could reasonably anticipate that because of such commerce and business transactions, it could reasonably expect to be haled into the courts of states in which it did business.

5) The agreement called for no significant performance by Respondent in Texas.

ARGUMENT AND AUTHORITIES

The Fifth Circuit Court of Appeals correctly determined that there was an absence of "minimum contacts" by the Respondent with the State of Texas, and that the Respondent had not engaged in an affirmative act or acts which would demonstrate a purposeful availment by the Respondent of the privilege of conducting business within the State of Texas so as to invoke the benefits and protection of Texas laws. Implicit in the holding of the Fifth Circuit of Appeals is the concept that in the absence of "minimum contacts," Respondent could not have reasonably expected the Courts of Texas to have any jurisdiction over it, and accordingly it would be unfair and unreasonable to require the non-resident Respondent to defend the suit in the Texas forum.

As stated at the outset, the sole question presented is one of basic due process under the United States Consti-

tution. Due process considerations in the context of whether a particular forum should exercise personal jurisdiction over a non-resident have been established by the following decisions of this Honorable Court: *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Kulko v. Superior Court of California*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

As stated by the Fifth Circuit Court of Appeals in *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003 (5th Cir. 1982) at page 1006:

> "As deduced from these decisions (cited above), the determination of whether personal jurisdiction exists is resolved by considering the following criteria: 1) did the defendant have sufficient minimum contacts with the forum state so that it is fair and reasonable to require the defendant to come into the state and defend the suit?; 2) did the defendant purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws? (This latter criteria also includes the consideration of whether the defendant's conduct in connection with the forum state was such that he might reasonably foresee being haled into court there.)
>
> "As these decisions also indicate, however, if the non-resident defendant's contacts with the jurisdiction were fortuitous, not deliberate, de minimus, not substantial, they do not give rise to personal jurisdiction in that forum. Further, whether the mini-

> mum contacts are sufficient to justify subjection of the non-resident to suit in the forum is determined not on a mechanical and quantitative test, but rather under the particular facts upon the quality and nature of the activity with relation to the forum state."

The particular facts in the instant case, which were thoroughly discussed and analyzed by the Fifth Circuit, in a somewhat oversimplified form, are that the out-of-state Respondent, doing business solely in the State of Alaska, was solicited by a representative of the Texas Petitioner in connection with a single transaction, governed by Alaskan law, which transaction was the out-of-state Respondent's sole contact with the State of Texas. The out-of-state Respondent did nothing to avail itself of the benefits and privileges of doing business in the State of Texas; it did not seek the protection of the laws of the State of Texas. Aside from the communications between the two parties, two visits by representatives of the out-of-state Respondent to the State of Texas, and Respondent's payments for the equipment, all of the other activity within the State of Texas was the unilateral activity of the Texas Petitioner. As this Court has stated in *Hanson v. Denckla*, supra:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirements of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of

its laws. (citing *International Shoe Co.*)." 357 U.S. at page 253.

Because of the Respondent's general lack of contact with the State of Texas, or perhaps more correctly because of the local Alaskan nature of the activities of the Respondent and the contract involved, the Fifth Circuit Court of Appeals determined that the necessary "minimum contacts" were absent and that there was a complete lack of purposeful activity on the part of Respondent invoking the benefits and protections of the laws of the State of Texas. Cases cited by the Fifth Circuit relating to similar single or isolated transactions by a nonresident defendant in the forum state were: *Benjamin v. Western Boat Building Corp.*, 5 Cir.1973, 472 F.2d 723, cert.denied, 1973, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64; *Charia v. Cigarette Racing Team, Inc.*, 5 Cir.1978, 583 F.2d 184, 187-88; *U-Anchor Advertising, Inc. v. Burt*, Tex.1977, 553 S.W.2d 760, 762, cert.denied 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978); and *Owen of Georgia, Inc. v. Blitman*, 5 Cir.1972, 462 F.2d 603. Though not cited by the Fifth Circuit, a case in point by the United States Court of Appeals for the Seventh Circuit is *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, 597 F.2d 596 (7th Cir. 1979).

Cases relied upon by the Petitioner such as *Product Promotions, Inc. v. Cousteau*, 5 Cir. 1974, 495 F.2d 483, *Southwest Offset, Inc. v. Hudco Publishing Co., Inc.*, 5 Cir. 1980, 622 F.2d 149, and *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, supra, were discussed by the Fifth Circuit in its opinion and were found to be easily distinguishable for various reasons, the more important of which would be the purposeful decision by each of

the out-of-state defendants to conduct a series of business transactions in the forum state, under that state's protection, for the purpose of extracting profits from that state's citizens.

Petitioner has devoted a substantial portion of the argument in its Petition in an attempt to show that the Fifth Circuit somehow improperly based its entire decision upon the fact that the written agreement between the Petitioner and the Respondent contained a provision making the agreement subject to interpretation and construction under the laws of the State of Alaska. While it is true that this fact was alluded to by the Fifth Circuit in its opinion, the Fifth Circuit treated such fact no differently than it had done in its previous holdings, i.e., *Marathon Metallic Co. v. Mountain Empire Co.*, 653 F.2d 921 (5th Cir. 1981) and *Gold Kist, Inc. v. Baskin-Robbins Ice Cream, Inc.*, 623 F.2d 375 (5th Cir. 1980), where such contractual language was deemed to be nothing more than evidence, or in the instant case, lack of evidence, of a minimum contact by the non-resident with the particular forum.

The number of contacts with the forum state have never by themselves been determinative in applying the due process clause in questions of *in personam* jurisdiction. What has always been more significant is whether the contact suggests that the non-resident defendant purposefully avails himself of the benefits of the forum state so that there are foreseeable consequences in the forum state, i.e., that the maintenance of a lawsuit in the forum state would not offend traditional notions of fair play and substantial justice. As this Honorable Court

noted in *World-Wide Volkswagen Corporation v. Woodson*, supra, at page 501:

> "The foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there."

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under Rule 17 that there are special and important reasons why the Writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another court of appeals on the same matter. The Court of Appeals correctly held that the findings and conclusions of the Trial Court were in all things proper. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the above Brief in Opposition to Petition for Writ of Certiorari were this 15th day of August, 1983, mailed to Mr. Donald E. Herrmann, Hudson, Keltner, Smith & Cunningham, 2300 Texas American Bank Bldg., Fort Worth, Texas 76102, Attorneys for Petitioner.

JOHN B. McCLANE